



**APPROVED**

**BOARD OF ADJUSTMENT  
CITY OF SCOTTSDALE  
CITY HALL KIVA  
3939 NORTH DRINKWATER BOULEVARD  
SCOTTSDALE, ARIZONA  
AUGUST 3, 2005**

**REGULAR SESSION MINUTES**

**PRESENT:** Terry Kuhstoss, Chairman  
Jennifer Goralski, Board Member  
Howard Myers, Board Member  
James Vail, Board Member  
Neal Waldman, Board Member

**ABSENT:** Ernest Jones, Board Member  
Vice-Chairman Perica

**STAFF PRESENT:** Tim Curtis  
Sherry Scott  
Al Ward  
Greg Williams

**CALL TO ORDER**

The regular meeting of the Scottsdale Board of Adjustment was called to order by Chairman Kuhstoss at 6:04 p.m.

**ROLL CALL**

A formal roll call confirmed the members present as stated above.

1. **ADMINISTRATIVE ITEMS**

Board Member Vail explained his proposal to amend the Rule 201 of the Rules of Procedure by striking the words "following the first Tuesday." This would eliminate occasional conflicts with the Planning Commission. He requested that it be placed on the agenda for the next meeting.

2. **APPROVAL OF MINUTES**

July 6, 2005 Board of Adjustment Study Session Minutes

**BOARD MEMBER VAIL MOVED TO APPROVE THE MINUTES AS SUBMITTED. SECONDED BY BOARD MEMBER MYERS. THE MOTION CARRIED WITH A VOTE OF FIVE (5) TO ZERO (0).**

July 6, 2005 Board of Adjustment Meeting Minutes

Board Member Goralski noted one correction to the minutes; that her name was misspelled.

**BOARD MEMBER GORALSKI MOVED TO APPROVE THE MINUTES AS CORRECTED. SECONDED BY BOARD MEMBER MYERS. THE MOTION CARRIED WITH A VOTE OF FIVE (5) TO ZERO (0).**

**REGULAR AGENDA**

Chairman Kuhstoss noted that any Applicants who wished could request a continuance to the next meeting of the Board, since the full Board was not in attendance. No such requests were made.

3. 5-BA-2005 Romo Remodel. Request for a Variance from Article V. Section 5.504.E.1.a regarding the front setback, Section 5.504.E.2.b regarding the side setback and Section 5.504.F.2 regarding the distance between buildings on a parcel at 7525 E. Windsor Avenue with Single Family Residential District (R1-7) zoning.

Mr. Verschuren presented the case, highlighting the three variances requested by the Applicant. The PowerPoint presentation included the site plan and an outline noting criteria for a variance.

Board Members Myers and Vail had questions regarding the setback for the garage. Mr. Verschuren explained that the carport met the existing 20-foot setback; however, the Applicant is requesting a 4-foot variance in the front to be able to store vehicles inside the closed garage.

Michael T. Romo, Applicant, addressed the Board. He presented photos of the property and discussed the reasons for his request. He shared neighborhood feedback with the Board.

Board Member Goralski stated support for all three variances.

Board Member Waldman reiterated support for the variances.

Board Member Myers stated that he was in agreement with Board Member comments and supports the request.

Board Member Vail expressed support for the request.

Chairman Kuhstoss said she would support the requests for variances on the two sides of the property; however, she did not support the request for the front yard variance.

**BOARD MEMBER MYERS MOVED TO APPROVE THE REQUEST FOR VARIANCE FOR THE FRONT OF THE ROMO REMODEL, CASE 5-BA-2005. BOARD MEMBER VAIL SECONDED THE MOTION. THE MOTION PASSED BY A VOTE OF FOUR (4) TO ONE (1), WITH CHAIRMAN KUHSTOSS DISSENTING.**

**BOARD MEMBER VAIL MOVED TO APPROVE THE REQUEST FOR SECTION 5.504.E.2 REGARDING THE SIDE SETBACK. BOARD MEMBER MYERS SECONDED THE MOTION, WHICH CARRIED BY A VOTE OF FIVE (5) TO ZERO (0).**

**BOARD MEMBER MYERS MOVED TO APPROVE THE THIRD REQUESTED VARIANCE FOR A 10-FOOT SETBACK BETWEEN BUILDINGS, CASE 5-BA-2005. BOARD MEMBER GORALSKI SECONDED THE MOTION, WHICH CARRIED BY A VOTE OF FIVE (5) TO ZERO (0).**

5. 7-BA-2005 Groman Variance for Backyard, a Variance from Article V. Section 5.034.G.1 regarding wall heights in the front yard on a parcel located at 29695 North 75th Place with Single Family Residential District, Environmentally Sensitive Lands, Foothills Overlay (R1-70 ESL FO) zoning.

Mr. Curtis advised the Board that the Applicant wished to request a continuance to the September 9, 2005 meeting.

**BOARD MEMBER VAIL MOVED TO CONTINUE CASE NUMBER 7-BA-2005 TO THE SEPTEMBER MEETING OF THE BOARD. SECONDED BY CHAIRMAN KUHSTOSS. THE MOTION CARRIED BY A VOTE OF FIVE (5) TO ZERO (0).**

Chairman Kuhstoss requested that the Applicant make the property accessible to Board members. Board Member Vail requested that the sign be reposted.

Ms. Scott addressed the question raised in the Study Session regarding posting a notice of public hearing on the property, confirming that this was required.

4. 6-BA-2005 Berkley. Request for a Variance from Article V. Section 5.5.204.E.3 regarding the rear yard setback at 9478 E. Cortez Street with Single Family Residential District.

**[BEGIN VERBATIM RECORD]**

**AL WARD:** "Chairman Kuhstoss and Members of the Board of Adjustment, this is the Berkley Residence. It is case 6-BA-2005 and it's a request for a variance of the rear yard setback requirement.

This is the residence, located in yellow. It's located near 96th Street and Cholla [phonetic]. It's known as the Alamosa Estates Subdivision. A little bit closer in you can see that it's a completely developed area. And it's located on Cortez Street. It's a pie-shaped lot. And the variances being requested are the rear yard, which is both on the north and west sides.

The zoning on the site is R1-35 PCD and with the approval of the zoning and plat case, there are amendment development standards with the property line for reduced lot areas on the front and side yards; not on the rear. Specifically Section 5.2.04 requires a rear yard in the R1-35 District of 35 feet.

A home addition has been created on this property, which would have a setback on the north side of 32-feet and on the west side of 30. Therefore, a request of a variance up to 5-feet is being made by the Applicant.

Again, the request is that the rear yard setbacks be varied from 35-feet down to approximately 30-feet. An addition was created on this site in 1999. The house was built in 1996. And the addition extends into these yards by a total of 42 square feet. That would be divided amongst the north side and the west side. So it's only a relatively small portion of each; however, it is as much as 5-feet.

Now, it's my understanding, and I know that the Applicant is going to speak to this, that the construction was started without a permit. In 1999 it was red-flagged by the City. The Applicant then submitted a building permit and the contractor attained, I guess, two of the inspections, but none of the final inspections. And therefore, that's the result of the location of the building into the rear yard setback.

The HOA has looked at this and has supported it. There are also three letters of support in the file.

This is the plat for Alamosa Estates. It's a 21-lot plat. It's actually got two zonings. I believe, it's R1-18 to the north. The subject areas R1-35 PCD. Now, with the plat you can see the setbacks were actually established on the plat; the setback requirements. So this shows the rear yard, 35-feet. It shows a side yard of 15-feet and a front yard, I believe is 25-feet. The same as this.

Now again, I believe that during the rezoning case the Applicant -- or I should say the property owners toward the west, wanted to maintain a proper setback or a substantial setback between their development and this development. And that's one of the reasons that the setback requirements for the rear yard was not granted as part of that.

Now, some of these other lots, I believe there's one immediately to the south and there's also one up here. There's a substantial tract between them and the property toward the west. This lot does not have such a tract. So anywhere there's a tract, that -- instead of being considered as a rear yard, was considered as a side yard; a 15-foot setback. But where there is no tract, the full 35-foot is required. And that was just the requirements of the plat that was approved at the time.

Specifically this house, has the pie-shaped lot. This is Cortez at the front -- Cortez Street; side yard, rear yard on the north, rear yard on the west and side yard on the south. So it's got a double rear yard requirement. This shows the encroachment into the rear yards requirement of 35. This one extends a little bit over two feet and the west side extends a little bit over five feet.

This is a picture of the addition. You can see the wall cant -- not cantilevers but extends out on both of the corners, so the setback line, I believe, would probably be right through the corner there. Something along those lines.

Again, also this corner, I believe it contains an office and a playroom, possibly a little bit of a kitchen extension as well. So these corners, that corner and the opposite corner encroach into these rear yard requirements.

This is the survey that was actually submitted, just completed. And that shows you the two areas again. The house is located right here, and these two areas extend into the rear yard requirements. Five feet extension there and approximately two there.

This is what I was trying to explain before. The lots, which have a separate tract between them and the western boundary toward the street have a side yard applied to the west boundary while the lots that do not have that tract, which would be this one and the one to the north; these two other tracts have the full 35-foot to maintain a maximum setback from any of the adjacent properties.

Specifically from the criteria point of view that the special circumstances apply to the property that do not apply to other properties in the area: the Applicant states

that amended development standards were applied to the lots; however, they were not applied to the rear yard, therefore, making it more difficult. This particular lot is 21,000 square feet in area. Again R1-35 would have a 35,000 square foot minimum. The amended development standards allow development all the way down to 15,000 square foot in area. So they're indicating that without a corresponding reduction in the yards, they make the site less developable, especially on something in the area of 15 or 20,000 square feet.

Again, the staff feels that the minor modifications to the building could be made to bring this into compliance with the setback requirements. The special circumstances were not created by the owner.

The Applicant states that the building envelope is substantially smaller than other R1-35 parcels in the area, therefore limiting the ability to use the site in a manner in which other properties of a similar size than R1-35 type of zoning would be able to do. They also indicated that the character -- this is not an out of character home. It's not an especially large house on a small lot; it's a typical home for this area. Unfortunately, they're just having difficulty maintaining all of the required setbacks.

Again, staff feels that the setback requirements of the plat were established prior to the development of the site occurring and therefore, all of these were circumstances which were known at the time of acquisition of the property.

The criteria number three that authorizes a variance as necessary for the preservation and the privileges and rights enjoyed by others, the Applicants state that it's difficult to develop this site due to the circumstances that were created through the original plat. And so these are circumstances which are in effect, handed down to them. And given the irregular shape due to the small size and due to the lack of a amended development standard on the rear yard makes it very difficult to develop this site.

Again, staff notes that the addition was added after acquisition of the site and after these provisions were already in place.

Finally, number four, that authorizing the application would not be materially detrimental to the persons residing or working in this neighborhood. The Applicant indicates that the variance is relatively minor in nature; 5-foot maximum and 42-square foot total. It matches the character of the other developments in the Alamosa Estates development.

Again, staff notes that no objections have been received by any of the neighbors. In-fact, we have received three letters, which aren't in your package, but three letters of support from adjacent land owners.

Madame Chairman, with that I'd be pleased to answer any questions. And the Applicant... "

**NOTE:** [INTERRUPTION IN AUDIO DUE TO TECHNICAL DIFFICULTIES:  
6:48:42 - 6:49:05]

**AL WARD:** "... were not fulfilled as far as the requirements of the City for this development, and I believe and the Applicant can probably explain this a little bit further. The Applicants have now come back and asked for this to be confirmed as a legal development. And the City has denied that based on the requirement for a variance and that is why it is before the Board of Adjustment tonight."

**BOARD MEMBER GORALSKI:** "Continuing on that question, which may be out of your expertise so I may ask Sherry to step in on this. What would happen if these folks went to sell their home and they had these encroachments that were in there and no building permits. Would this be something that a title company would insure over? Is this something that wouldn't be permitted?"

**MS. SCOTT:** "Madame Chair, Commissioner Goralski, there is a state statute that provides that if new homeowners purchase a property that does not comply with the zoning or it wasn't properly permitted, that new homeowner can not be held accountable and so, if it were sold to a new homeowner, that homeowner would not be subject to code enforcement and would not be required to tear down the property."

**BOARD MEMBER GORALSKI:** "I see. Thank you."

**COMMISSIONER WALDMAN:** "Mr. Ward, I have actually two questions along those same lines. Was it possible -- when this was originally done, and you had talked about the 35-foot setback along the west side, was this deed restricted at all by -- was it a condition of the development by the neighbors to the west that the developer could only develop if it was deed restricted to 35-feet?"

**MR. WARD:** "I don't know about the deed restrictions. All I know about is the rezoning where the neighbors came in and spoke to maintain the separation distance on the west. And the amended development standards with both the zoning and the plat, which specified setback requirements as well as showed where those boundaries were on the actual plat. If it was just the setback requirement of 35-feet and didn't show it on the plat, there's a possibility that the City could have worked through the process. But since it was clearly shown at 35 feet and where the boundaries were, that's what the City had to stand by."

**BOARD MEMBER WALDMAN:** "And also, was this flagged as a code violation?"

**MR. WARD:** "I believe it was flagged as a code violation; a development that had not received a building permit, back, I believe, in December of 1999."

**BOARD MEMBER WALDMAN:** "But it wasn't flagged recently as a code violation, bringing this case to light?"

**MR. WARD:** "That is correct. It was flagged then and it has not been resolved to the point where the City would be prepared to issue them the final approvals or the inspections, et cetera."

**BOARD MEMBER WALDMAN:** "Thank you."

**BOARD MEMBER GORALSKI:** "Continuing on that thought, Mr. Ward, so theoretically they voluntarily came in and told on them themselves because there wasn't any code enforcement activity?"

**MR. WARD:** "Board Member Goralski, I believe that -- for starters, I'd like to say that the Applicant can probably fill in a few of these details, but I just want to go back to one previous matter in your question about if it sold, then it's no longer -- the new people are no longer in violation, but possibly when people come in to buy it, they would like to get confirmation that it conforms to the City standards. So possibly that was something to be initiated. I'd have to get the Applicant to further elaborate on that."

**CHAIRMAN KUHSTOSS:** "When the initial plans or permit process was started, did the plans presented conform to the 35-foot setback?"

**MR. WARD:** "Chairman Kuhstoss, I believe for starters, my understanding is that the construction was begun without a permit. That's what I understand right now. It was immediately, very soon after, within a couple of weeks, red-flagged by the City, and the City -- so they did apply for a permit. I don't want to say that the City authorized a permit within the required setback, so I'm just trying to think of what else I could add. I believe there's a possibility that it was done with the understanding that it would meet the setbacks, but it went ahead, outside of the setbacks."

**CHAIRMAN KUHSTOSS:** "Thank you."

**BOARD MEMBER VAIL:** "The flag that was attached in 1999, apparently at some point went away?"

**MR. WARD:** "No, it didn't go away. What happened -- development was occurring without a building permit so the Applicant -- the owners went ahead and applied for a building permit with the City. The City issued the building permit, as I understand, subject to and I'm sure it was subject to the conformance of the ordinance. A couple of inspections were done. Things were started. But



the contractor, to my understanding, went ahead and built it without further inspections. And therefore, there's not an official approval of this as far as the City's concerned."

**BOARD MEMBER VAIL:** "Thank you."

**BOARD MEMBER MYERS:** "Thanks. I've got a couple of questions. First, is this space being lived in?"

**MR. WARD:** "Yes it is, Board Member Myers."

**BOARD MEMBER MYERS:** "Okay, and obviously there was no CO issue because it didn't go through the whole process, correct?"

**MR. WARD:** "That's my understanding, yes."

**BOARD MEMBER MYERS:** "Okay. I don't think a title company would let that slide by, but you never can tell. The real critical question I had: you said there were two inspections before and did they successfully pass? Because one of the first, I would think, would be foundation and all of that, which is where the setbacks would come into play. Do you know what the status of that is? I mean, if they passed two inspections they must have done something either right or an inspector missed the fact that they were outside of the limits."

**MR. WARD:** "The Applicant actually has copies of those -- that information. The inspections; they occurred, I can't say for sure that they were passed. There was a question about the lath that was going to be for the footers and it was kind of in a flux at that period, I believe."

**BOARD MEMBER MYERS:** "Okay, from that perspective it's pretty important to know whether or not it passed an inspection at that stage because that's kind of the City saying it's okay, if it did. And you know, that's why I wanted to know. So perhaps when the Applicant comes up we can address that."

**CHAIRMAN KUHSTOSS:** "Thank you. Will the Applicant please come forward?"

**MICHAEL CARVER:** "Good evening, Madame Chairman and Board Members. My name is Michael Carver. I am an attorney here in Scottsdale and I represent Glenn and Amy Berkley. Amy Berkley is out of town, but Glenn is present and he does intend to offer some testimony and answer questions from the Board, but I thought I would start off by introducing what I know from my interviews and review of the records that pertain to this particular property. Mind if I use the Elmo? Okay.

It's my understanding that in December of 1999, the Berkley's' hired a contractor to do a couple of small additions to their home -- to their house, in the location that you saw on the drawings. Apparently the contractor began the excavation work without obtaining a building permit. This was noticed by City inspectors and the work was red-flagged. I believe it was December 16th of 1999. As of December 21st, 1999 -- I mean, as soon as the Berkley's learned that there was a problem, they instructed their contractor to obtain building permits, which the contractor did. And I have a copy of the permit that was issued by the City. And as you can see from the date on it here -- so as of December 21st 1999, there was a building permit issued for this project. And the red-flag, again, was on December 16th at the time that the excavation was going on. Footings had not been poured by that time.

Then on December 23rd, an inspection of the footings -- of the location and the forms for the footings, was conducted by the City. I have a copy of the inspection record here. And I believe you can see where it says, it's dated here: 12/23/99. There was also an inspection of the natural gas line and again it's dated 12/23.

Now it's my understanding from the Berkley's that there was some indication that the footings were outside of the -- excuse me, were inside of the setback area and that the City inspector did notice that. There was some discussion with City staff at that time. There is a letter that Amy Berkley wrote to the City of Scottsdale, back -- this would be on the 24th of January, 2000. This was after it was -- the footings were approved; they were poured. And I have a City of Scottsdale inspection services approval as of January 25th of the year 2000. So, it's my understanding from speaking to Amy Berkley that she wrote this letter on the 24th. She had a conversation with somebody in Building and Planning; she can't say who. She doesn't really remember, but that she was told that the problem with the footings being in the setback was not a problem because they were within what should have been a side yard as opposed to a rear yard. I've checked with Mr. Ward and there appears to be no documentation in the City files but we do have a copy of the approval from the City for the footings.

The contractor then finished the structure and he was paid. As far as the Berkley's knew, the house was fine. There were permits for it. It's just recently when they went to obtain refinancing for their home that they learned, as Board Member Myers noticed, that the lender was not willing to issue a new loan that would include the additional square footage, unless there were building permits for this property.

So, in effect to and to answer Board Member Goralski's question, they did turn themselves in. They came to the City and said this is what happened. Here's the documents that we have. They believed, and I think that their document shows that the City did approve the location of the footings. So that's one special circumstance.

But then I think City staff has adequately pointed out that given the shape of this lot, and the minimal size of it and the fact that it's got two 35-foot rear yards attached to it, basically can not enjoy the same use and enjoyment of their property as the other homeowners in the Alamosa Estates subdivision enjoy, due to circumstances that concern the shape of the lot and the size of the lot and the fact that this 35-foot setback from their drainage area, all of those were not created by the Berkleys.

And so what should have happened is the variance should have been applied for prior to them constructing this addition. They're coming to you back, but it doesn't change the fact that the circumstances to support the variance are still in place. I'd like to answer any questions that you may have."

**BOARD MEMBER MYERS:** "You showed us a copy of the permit. Are there plans that go with that permit? There should have been. They should have been on the plat map that shows the sub-facts and all of that."

**MR. CARVER:** "It's my understanding that yes there were plans. I checked though with Mr. Ward and there apparently is just not a file. The City can't seem to find one. At least that's my understanding."

**BOARD MEMBER MYERS:** "So the homeowner doesn't have any either, is that?"

**MR. CARVER:** "No."

**BOARD MEMBER MYERS:** "Okay. When was this addition completed?"

**MR. CARVER:** "It was completed, I believe, in either January or early February of the year 2000."

**BOARD MEMBER MYERS:** "And that letter that you showed us that was to the City that, at least in my mind, says there's a problem and we'd like some relief on it; when was that dated?"

**MR. CARVER:** "That letter was January 24th, 2000."

**BOARD MEMBER MYERS:** "So somewhere in here I gather they recognize it was an issue. Is that correct?"

**MR. CARVER:** "It's my understanding from Amy Berkley that there was a discussion that she had with City staff that they explained that they were going to allow them to proceed with construction of this addition and that it was not going to be a problem. Apparently this was only an oral representation. It was not documented and the City doesn't have any records of it. All that we have is a

copy of the letter that she prepared to deal with the issue. And then the fact that the location of the footings was approved by the City."

**BOARD MEMBER MYERS:** "That's 1/25?"

**MR. CARVER:** "That's correct."

**CHAIRMAN KUHSTOFF:** "Was this a licensed contractor that was used?"

**MR. CARVER:** "It's my understanding that yes, it was a licensed contractor. I would also like to point out that prior to coming to the Board of Adjustment, the Berkley's first sought to do a boundary line adjustment with their neighbor to the north. And attempted -- they paid legal expenses and they paid survey costs to have a boundary line adjustment surveyed out and to have a sales agreement prepared and they were prepared to purchase the additional square footage from their neighbor to the north. Unfortunately at the last minute, based upon some legal advice that it may create setback problems for that neighbor, he decided not to follow through. So the Berkleys have basically exhausted every other way that they could deal with this problem other than coming to this Board."

**BOARD MEMBER VAIL:** "If we approve, and this is probably addressed as much to you, sir, as it is Counselor Scott. If we approve the appeal, will the Berkleys then have to apply for building permits?"

**MR. CARVER:** "Yes."

**BOARD MEMBER VAIL:** "And if so, how can building permits or inspections be done inasmuch as the work is now all covered?"

**MR. CARVER:** "Well shortly after they learned that there was a problem, and this wasn't included in your packets, but it was submitted to the City. There is a--"

**BOARD MEMBER VAIL:** "The engineering -- engineer's report?"

**MR. CARVER:** "There is a stamped letter from a licensed engineer who did an inspection of this property and determined that it did it meet building codes."

**BOARD MEMBER VAIL:** "And the City will accept that and grant the building permits?"

**MR. CARVER:** "It's my understanding that the City may want to come out and conduct additional investigations. But there are drawings that accompany this engineers report and we'll just have to jump through whatever hoops the building department wants us to jump through in order to get a building permit issued."

But the first step, and the step that should have been taken back in 1999, was approval of a variance. And again, I just want to emphasize that the reasons that we're asking for a variance are the same now as they would have been in 1999. And that's based on the size and shape of the lot and this 35-foot setback off the west side of the property."

**BOARD MEMBER VAIL:** "Now if there was not a building inspection completed, there apparently was not an occupancy permit issued, whether or not that's needed for an addition, I don't know. But if not, and with the scenario that this appeal is not approved, do the Berkleys just continue on with the status quo and don't seek a refi? Or until they sell the house, is that going to be a forever problem?"

**MR. CARVER:** "I think that's the way that we would look at it. I mean, obviously in order to sell the home, now that the Berkleys are aware of this problem and that they brought this matter to the City, they would have to make a disclosure to any potential buyers, of this problem. They have contacted a contractor about whether or not they can pull the walls back and unfortunately they can not do so without substantial expense because of the way that the roof is framed, that it overhangs. You could pull the walls back, but you're still going to have an overhang that exceeds City code into the setback area."

**BOARD MEMBER VAIL:** "Thank you. That answers all of my questions."

**MS. SCOTT:** "Madame Chair, Commissioner Vail. These property owners could be subject to code enforcement if they do not receive a variance. They could be cited and eventually they could be required to remove the portion of their home that does extend into the setbacks."

**BOARD MEMBER VAIL:** "Thank you."

**BOARD MEMBER GORALSKI:** "I have a quick follow-up to Commissioner Vail's question that might be better suited for Mr. Ward. And that is: Can a building permit be obtained and an inspection done with no plans? Because it's been said by the Applicant and by the City that no plans exist."

**MR. WARD:** "Board Member Goralski, normally plans would be required as part of the building permit application. I don't believe a permit would be issued normally without a set of plans to go along with the approval or reviews."

**BOARD MEMBER GORALSKI:** "Thank you."

**BOARD MEMBER WALDMAN:** "One other question. I'm having a problem getting past this. The neighbors to the west that had a requirement on the setbacks before allowing this whole subdivision to be built, do you know if they have legal or if they have any recourse to stop this?"

**MR. CARVER:** "I don't know if they would have any recourse. They were certainly all notified of this proposal. And we've received no opposition. In-fact, we've received letters of approval, specifically asking the Board to approve this variance. And that's from the neighbor to the north and the neighbor to the east."

**BOARD MEMBER WALDMAN:** "Thank you. But my question is about the neighbors to the west."

**MR. CARVER:** "Correct."

**BOARD MEMBER WALDMAN:** "They're the ones that put in the requirement for setback. Have they been notified and have they made any comments?"

**MR. CARVER:** "Yes. Yes, all of the properties that can be viewed here to the west have been notified. And we've received no opposition. You'll notice that 94th Way separates this property from this tract lay area here."

**BOARD MEMBER WALDMAN:** "Thank you."

**CHAIRMAN KUHSTOSS:** "Thank you."

**MR. CARVER:** "Glenn, is there anything that you'd like to say?"

**GLENN BERKLEY:** "Good evening, Chairman. Sorry for that; Chairwoman and Council Members. I appreciate the opportunity to speak in front of you today.

Well, just to highlight some additional things. This has been a forever problem for my wife and I. Just to give you a little, I guess, description on the situation at hand. My wife was pregnant with our third child and that was the reason for the room addition, which was the playroom. My wife works out of home and that was the rationalization for the addition to the office. Those are the two areas that we're discussing. There is no kitchen or plumbing area involved whatsoever in either one of the two additions.

The total area in question is less than 3-feet on the playroom; it's the northeast corner of the playroom. And then it would be the northwest corner of the office. We had -- my wife had met with some various people at the City and we were told that the plans were misplaced that had been submitted. I don't have documentation to that effect, but we did have oral communication with various members of the City and this whole thing was kind of a fiasco. Things got delayed, things got put off, things got mis-communicated and we went back and forth, back and forth.

And it was told to us that maybe one of our better options was to pursue a lot split adjustment with our neighbors to the north. And we turn went through great

expense and great time and great effort and the neighbors to the north, who are only here for a very short period of time each year, through their legal representation decided not to do that, but that they would fully support a variance, if it were to be granted.

In addition, I think it was Lot 7 and Lot 8, we did receive letters of approval and support as well as the neighbor immediately to the east of us. Those would be the affected neighbors.

Of course, if the room or rooms were required to be either destroyed or repaired or reconstructed, there would be great noise, pollution that would take place as well as great financial expense. And great hardship to my wife and my family.

My wife and I are not in the building industry. We don't have experience with this type of situation. We were duped by the contractor, who told us that he did have permits. We were referred to this individual. We did trust him to do the work that he said he was going to be able to do. And obviously he did it in a negligent fashion.

When we were notified through the, I'm not sure what it's called, but the stop work order, we then sought out to make it right and to do what was right. And we then contacted the City. They said that we needed to get a permit. We then pursued those avenues. We had people come out to the house. We did hire a civil constructural engineer. We did hire a surveyor.

You know, we've gone through great hardship and great time and effort to try to make this right. And this is basically our last stop, in front of you know, you people to try to see if they could possibly help us out. I'll answer any questions. I, you know, it's not -- the two room additions, as you can tell, are not causing any hardship to anybody in the neighborhood."

**BOARD MEMBER GORALSKI:** "Mr. Berkley, you indicated that the City gave some sort of work stoppage to you? Is that correct? You said you didn't know what it was called: stop work order or stop order."

**MR. BERKLEY:** "Whatever -- "

**BOARD MEMBER GORALSKI:** "And my question is: When was that? Was that 1999?"

**MR. BERKLEY:** "Yes, the very end of 1999."

**BOARD MEMBER GORALSKI:** "And at that point, what type of work was already done on the project?"

**MR. BERKLEY:** "I think almost the majority of it was done. I won't say 100 percent, because it wasn't fully completed, but I think the majority of the project was finished. No, it wasn't?"

**MR. CARVER:** "If I might to try to answer that. As you saw from the documentation that I put here on the Elmo and let me just find it. The footings themselves....

**NOTE:** [INTERRUPTION IN AUDIO DUE TO TECHNICAL DIFFICULTIES:  
7:16:50 - 7:16:59]

**MR. CARVER:** ...issued on December 16th of 1999. So it's my understanding that there was some excavation that had occurred at that point. That's what flagged the red-flag from the City. As soon as the Berkley's learned of this, they ensured that a building permit was applied for. And as I indicated, that was applied for on December 21st of 1999. So then it's January 25th when the City gives approval for the footings, as the sheet I just had up indicated."

**BOARD MEMBER GORALSKI:** "Not to interrupt you, but theoretically this all could have been avoided in 1999 and the structure could have been, let's call it pulled back, to meet the setback requirements prior to it being completed. Am I correct in that interpretation?"

**MR. CARVER:** "I don't believe that that's the case. I mean, what should have happened is before they applied for a building permit, there should have been a variance request made because they couldn't do -- I mean, these are, as you saw from the photographs, they are just a square extension off of the home. And so their not changing any architectural style of the home and that was the simplest way to expand the size of their house.

So if they had been aware of the fact that there were some minor encroachments into the setbacks in 1999, the Berkleys would have come forward, applied for the variance submitted the very reasons that staff has already advised you of: this is an undersized lot, it's a strangely shaped lot, it's building envelope is not similar in size to the other lots that are just adjacent to it and with the same zoning. And so in order to enjoy a home of suitable size and amenity to the other homes in this subdivision, a variance, I think, would have been warranted back in 1999. It just never was applied for. And that's why we're here now."

**BOARD MEMBER GORALSKI:** "Thank you."

**MR. BERKLEY:** "I just wanted to follow-up one comment. I was mistaken in saying that it was mostly completed. My wife works at home. I had really limited involvement with this whole project. Our third child was born on May 25th of the year 2000. And the project was just completed, I think, the week of his birth. So, from the period of, I guess, December or January through that point



in time, that was the period when the project was taking place. So it couldn't have possibly been primarily or majorily completed by that time."

**BOARD MEMBER GORALSKI:** "Thank you for the clarification."

**BOARD MEMBER MYERS:** "I noticed on that approval, it says: Pending building permit approval. So to me this isn't quite an approval of an inspection because he didn't have a building permit to approve it against. Would you like to comment on that?"

**MR. CARVER:** "Yes. I was going off -- I mean, I looked at this but I was also looking at the inspection card, which does show that the inspection was made and this, unfortunately, this is not dated, but at some point we have a sign-off on the footings. And then we also have a building permit that was issued and it does have, you can see in the lower corner there, it does have the stamp from the City on it. Here, December 21st of 1999. So whatever plans would have been required by the City for the issuance of the building permit would have been submitted as of this date and point in time."

**MR. BERKLEY:** "One more add on. When we approached the City during this process and then we came back to them, I can't tell you how many months, it might have even been over a year. The person we were dealing with at the City couldn't locate the file and still today, the file is not to be located. So there were, you know, there's a lot of missing pieces, unfortunately, but you know it has really been a hardship for us. More than we can really share with you."

**BOARD MEMBER VAIL:** "Procedurally, when a permit is issued, a homeowner brings in plans. Are the measurements determined at that time? Side yard setbacks, et cetera."

**MR. WARD:** "Chairman and Board Member Vail, yes, that would be the case. They would show the location of the improvements as well as setbacks."

**BOARD MEMBER VAIL:** "So apparently, even though we can't locate the plans, you are saying that apparently the builder, on his plans, showed that it was within the setback area. And when he built the project, then he extended it beyond what the plans had originally shown?"

**MR. CARVER:** "We don't know that to be the case. Certainly a plot plan would have to have been submitted in order to obtain a building permit. And we have the location of the footings, was apparently approved by the City. It's my understanding that the fact that there was an extension into the setback area, was a matter that was specifically discussed with City staff by Amy Berkley, Glenn's wife, that this issue was brought up, it was identified, it was talked about and basically there was some oral representations that, given the circumstances in this particular case and given this sort of minor nature of the problem, that this project

was going to be allowed to go forward with. That's the understanding that Amy Berkley has and it wasn't until just recent -- well, not just recently. About a year and a-half ago, when the Berkleys applied for refinancing on their house, that they learned that there was no occupancy permit for this project, which later brought them -- well, they went back to the City and they said well, if someone told you, told Amy, that it was okay where these footings are, they were wrong. You need to do a boundary line adjustment, which they tried and they were unable to secure that. And after putting substantial effort and cost into that, they are now here to apply for the variance. Which I think, just on independent grounds, separate of the fact that this thing is in place, is warranted and it is justified based upon the criteria in your code, as addressed by staff.

Now, I mean I suppose there's a suggestion I think from staff, that well, by building the extension to their home, the Berkleys have self-imposed this hardship. But the hardship really comes from the shape of the lot and the fact that you've got setbacks that are designed for 35,000 -- minimum, 35,000 square foot lots, being applied and in this case, you have to 35-foot setbacks, both on the west side and on the north side, to a 22,000 square foot lot. And basically the Berkley building envelope is substantially smaller than any of the other properties that are in the Alamosa Estates subdivision. And that's why I think, had they applied for a variance in 1999, the criteria was the same. And I think they would have been entitled to one at that point in time."

**BOARD MEMBER VAIL:** "Okay, thank you."

**BOARD MEMBER GORALSKI:** "Mr. Berkley, are you pursuing legal action against the contractor?"

**MR. BERKLEY:** "I'm sorry, I can't hear you."

**BOARD MEMBER GORALSKI:** "Are you pursuing legal action against the contractor?"

**MR. BERKLEY:** "The contractor has skipped town and we have no way to find him, locate him or try to get any remediation from him. This has been a total disaster. Just saying that, we did file a claim with the, I think it's called the Arizona Board of Contractors, and they did pursue a claim against him and when they went to look up his license number they found that it was either invalid or that it had expired."

**CHAIRMAN KUHSTOSS:** "Thank you. Do we have any public comment? Mr. Waldman, do you want to start the discussion?"

**BOARD MEMBER WALDMAN:** "Tough. What disturbs me more than the encroachment, is that the City could have actually flagged this a couple of ways along the line. A, from the drawings. B, being onsite inspections. And certainly

the Applicant has not tried to hide from it, has tried to make it right all along the way. You have some special circumstances on the lot, given to rear setbacks and the size of the lot, but I cannot find myself penalizing the Applicant for the City's, at that times, negligence in overlooking certain permits that obviously evidence shows that were on file. I want to vote to support that variance."

**BOARD MEMBER MYERS:** "Well, I guess I don't see it that way. There may be special circumstances to the lot, I don't know. But they certainly were known when you purchased the lot and also when you went to build this addition. I don't think that would be detrimental in any way; I'm a little concerned about the setback myself and why it was issued, but nonetheless it's there and you have to work with that when you go to build anything. I certainly don't like the idea of imposing a hardship on you to change this, but a lot of this I think is, at least in my mind, self-inflicted. You obviously knew there was a problem before construction went too far, based on the dates of when things were looked at and inspected and all of that. It sounds like you were just getting to the footings when you realized there was an issue. And really, as a homeowner or anything else, it's incumbent upon you to make sure that that is taken care of before you continue. So I have a little problem buying into any of that and I do think that this is caused by the homeowner, not by external forces of some sort.

The City, whether they were neglect-ant or not, I don't know because you don't have records. The fact that there are no plans, the fact that the inspection kind of says there was no permit at the time, kind of tells me that it never went through the proper process and maybe that's why there's not a file. I don't know. And then a number of years went by where this was ignored and then when you have to do something: either sell the house or go for loan, that's when the title companies get involved and see what's going on. So, I have a little trouble that nothing was done in that interim either, so based on all of that and probably too much talking, I won't support it."

**BOARD MEMBER VAIL:** "We see these double front lots frequently and they do, in my opinion, certainly create a hardship. I'm of the opinion that had the obfuscation of all of these other circumstances not been here, that that small tiny setback intrusion would have passed our Board. Certainly I would have been in favor of it. And I don't want to see all of the other circumstances interfere with how I voted had they not been done. I would have voted to support the encroachment into the side yard set -- into the setback areas. And I would continue to support it."

**BOARD MEMBER GORALSKI:** "I concur with the majority of what Commissioner Myers said, with the exception is that I disagree that there's a special circumstance to this particular lot. And I say that because 35-feet is an awfully large setback and what you are proposing is a small intrusion into that that could have been avoided. And could have been avoided in 1999 at the footing stage. I don't think that that would have intruded on your residence as

much as you're indicating. However, I do think that in tearing down the additions, that will intrude on your residence. And I do believe it was self-imposed. I do believe that this could have been avoided and I will not be supporting the variance request."

**CHAIRMAN KUHSTOSS:** "I am in agreement with Commissioners Goralski and Myers. I will not be supporting the variance."

"Do I hear a motion?"

**BOARD MEMBER MYERS:** "I make a motion to deny 6-BA-2005."

**BOARD MEMBER GORALSKI:** "Second."

**CHAIRMAN KUHSTOSS:** "All in favor of denying the variance, please say aye."

**BOARD MEMBER GORALSKI:** "Aye."

**BOARD MEMBER MYERS:** "Aye."

**CHAIRMAN KUHSTOSS:** "Aye."

"All of those opposed?"

**BOARD MEMBER WALDMAN:** "Aye."

**BOARD MEMBER VAIL:** "Nay."

**CHAIRMAN KUHSTOSS:** "The variance is denied."

**BOARD MEMBER MYERS MADE A MOTION TO DENY 6-BA-2005, SECONDED BY BOARD MEMBER GORALSKI. THE MOTION CARRIED BY A VOTE OF THREE (3) TO TWO (2), WITH BOARD MEMBERS WALDMAN AND VAIL DISSENTING.**

### **ADJOURNMENT**

With no further business to discuss, the meeting adjourned at 7:26 p.m.

Respectfully submitted,  
A-V Tronics, Inc.